LIBRARY
SUPREME COURT, U. S.

FILED
OCT 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, 19.....

No. 75-634

MATHEW S. JASINSKI, EDWARD BOROWIK, MAX R. SHELTON, JOHN R. THOMAS, GEORGE WIMBERLY, JOHN GOODLEFSKY, STEPHEN J. KRATZ, PHILLIP BEAULIEU, M. E. URRA, J. STEWART HARRISON, JOHN W. ROACH, JR., and CHARLES K. JOHNSON,
Petitioners,

VS.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TOM CARTER,
Counsel for Petitioners
1726 Fulton National Bank Bldg.
Atlanta, Georgia 30303
404—688-7026

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

I. OPINIONS BELOW 2

II. JURISDICTION 2

III. QUESTIONS PRESENTED FOR REVIEW 2

IV. STATUTES INVOLVED 3

(a) Section 2, Fourth of the Railway Labor Act, 45 USC Section 152, Fourth 3

(b) Section 2, Ninth, of the Railway Labor Act, 45 USC Section 152, Ninth 4

V. STATEMENT OF THE CASE 4

A. Summary of the Facts 4

B. Proceedings Below 7

VI. REASONS WHY CERTIORARI SHOULD BE GRANTED 7

A. What Petitioners Seek is Simply to Enjoy Right of Craft Organization and Craft Representation in Collective Bargaining as Sanctioned by the Act and the Board's Prior Certification 8

B. What Petitioners Do Not Seek is any Infringement of the Board's Jurisdictional Functions 10

TABLE OF CONTENTS (Continued)

Page

C. The Board Itself has Expressly Denied Any Jurisdiction to Adjudicate Petitioners' Subject Claim (Appendix C) 12

D. Court Jurisdiction of Petitioners' Claim is Strongly Suggested by Prior Decisions of this Court Holding, that the Exclusive Jurisdiction of the Railroad Adjustment Board under the Act, did not Bar Court Jurisdiction to Define Unfair Representation Cases Against Unions and Employers Jointly 15

VII. CONCLUSION 18

CERTIFICATE 19

APPENDICES—

APPENDIX A—Opinion of the District Court for the Northern District of Georgia, Atlanta Division (No. C74-1780A), rendered on February 4, 1975 20

APPENDIX B—Final Judgment of the United States Court of Appeals for the Fifth Circuit, rendered July 29, 1975, reported at 517 F.2d 478 31

APPENDIX C—National Mediation Board's Determination dated July 15, 1974, File No. C4294 32

TABLE OF AUTHORITIES

CASES: Page

Brotherhood of Railroad Trainmen vs. Howard, 343 U.S. 768; 30 LRRM 2258 10

Conley vs. Gibson, 355 U.S. 41, 44, 41 LRRM 2089 (1957) 15, 18

Cunningham vs. Erle R.R. Co., 266 F.2d 411, 415-16 44 LRRM 2093 10

Czosek vs. O'Mara, 397 U.S. 25, 73 LRRM 2481 (1970) 15, 17, 18

Gainey vs. Brotherhood of Railway & Steamship Clerks, 313 F. 2d 318, 324, 52 LRRM 2196 (3d Cir. 1963) 10

Glover vs. St. Louis-San Francisco Railway Company, 393 U.S. 323, 70 LRRM 2097 (1969) 15, 16, 18

Graham vs. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 25 LRRM 2033 10

Hayes vs. Union Pacific Railroad Company, 184 F. 2d 337, 26 LRRM 2566 (CA 9, 1950), cert. denied, 340 U.S. 492, 27 LRRM 2456 (1951) 16, 17

Simberlund vs. Long Island Railroad Company, 421 F. 2d 1219, 73 LRRM 2451 (CA 2, 1970) 10

Steele vs. Louisville & Nashville R. Co., 323 U.S. 192, 15 LRRM 708 10

TABLE OF AUTHORITIES (Continued)

CASES: Page

Thompson vs. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 198-99, 52 LRRM 2880 (4th Cir. 1963) 10

Tunstall vs. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 15 LRRM 715 10

Vaca vs. Sipes, 386 U.S. 171, 190-93, 64 LRRM 2369 (1967) 10

STATUTES:

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 151 et seq. 7

Section 2, Ninth of the Railway Labor Act, as amended 45 U.S.C. Section 152 (Ninth) 3, 4, 7, 11

Section 2, Fourth of the Railway Labor Act, 45 USC. Section 152, Fourth 3, 8

45 U.S.C. Section 1331 7

Section 3 First (i) of the Railway Labor Act, 45 USC Section 153, First (i) 15, 16

OTHER AUTHORITIES:

National Mediation Board's Determination dated July 15, 1974, File No. C4294 28

IN THE

SUPREME COURT OF THE UNITED STATES

..... Term, 19.....

No. .....

MATHEW S. JASINSKI, EDWARD BOROWIK, MAX R. SHELTON, JOHN R. THOMAS, GEORGE WIMBERLY, JOHN GOODLEFSKY, STEPHEN J. KRATZ, PHILLIP BEAULIEU, M. E. URRA, J. STEWART HARRISON, JOHN W. ROACH, JR., and CHARLES K. JOHNSON,

Petitioners,

VS.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners here were plaintiffs in the lower district court, and were appellant in the Fifth Circuit Court of Appeals below. Petitioners pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 29, 1975.

I. OPINIONS BELOW

The opinion in this case of the District Court for the Northern District of Georgia, Atlanta Division, (No.C74-1780A) was rendered on February 4, 1975, and a true and correct copy of that court's judgment and opinion is appended hereto as Appendix A.

The final judgment and opinion of the United States Court of Appeals for the Fifth Circuit, sustaining the lower district court, was made and entered on July 29, 1975, and the same is reported at 517 F 2d 478; And, a true and correct copy thereof is appended hereto as Appendix B. Said judgment of the Fifth Circuit Court of Appeals issued as the court's mandate on August 20, 1975.

II. JURISDICTION

This petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, seeks to review that court's said final judgment of July 29, 1975 (appended as Appendix B) which affirms the lower district court's judgment of dismissal (Appendix A) of petitioners' Complaint in the court. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW

Did the lower courts correctly hold that the district court lacked subject matter jurisdiction based upon the conclusion that exclusive jurisdiction of the subject matter was in the National Mediation Board (herein the Board) under the Railway Labor Act (herein, Act). notwithstanding the Board's prior express determination (see Appendix C) that it lacked jurisdiction to adjudicate petitioners' following claim:

> That IAM, the respondent labor organization (which had previously been certified by the Board pursuant to provisions of the Act to represent petitioners' certified employmental collective bargaining craft) violated its lawful duty of fair representation owed petitioners; through IAM's manner and method of representing petitioners said certified bargaining craft—not as a separate certified bargaining craft, but merely as a small part of a single and substantially larger uncertified and heterogeneous collective bargaining class of sundry employees of petitioners' employer, in a single process for all collective bargaining purposes.

More specifically, did the lower court correctly hold that petitioners' said claim constitutes a ". . . dispute . . . among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of . . . (the Act)" within the meaning of Section 2, Ninth of the Railway Labor Act as amended, 45 USC Section 152 (Ninth); so as to be within the exclusive jurisdiction of the Board to certify an appropriate collective bargaining craft or class of employees and the representative to represent them.

IV. STATUTES INVOLVED IN THIS CASE

(a) Section 2, Fourth of the Railway Labor Act, 45 USC Section 152, Fourth, provides in pertinent parts as follows:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft

> or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Chapter. . ."

(b) Section 2, Ninth, of the Railway Labor Act, 45 USC Section 152, Ninth, provides in pertinent parts the following:

> "If any dispute shall arise among a carrier's employees as to who are representatives of such employees designated and authorized in accordance with requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier . . . in the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election . . . ."

V. STATEMENT OF THE CASE

A. *Summary of the Facts*

Petitioners are employees of Eastern Airlines (herein, Eastern), an air carrier subject to the provisions of the ACT. Petitioners are employed in a collective bargaining unit or craft of Eastern employees; which craft, in prior years, has been certified by the Board, pursuant to the provisions of the Act, to include principally Eastern's highly skilled and lawfully licensed airline mechanics, such

as petitioners, and also including certain smaller fringe groups of shop laborers, janitors, and ground service and cleaning employees (herein called PETITIONERS' CRAFT OR UNIT).

However, the last formal certification of petitioners' bargaining craft by the Board itself expressly EXCLUDED therefrom Eastern's numerous cargo and baggage handling employees, and sundry other employees.

The Board itself has never issued a formal certification, accompanied by a customary election among effected employees, for the inclusion of these aforesaid cargo and baggage handling employees and sundry other employees of Eastern into petitioners' certified bargaining craft.

As is often the case in the airline industry, the airline mechanics of Eastern were among the first ground employees to be organized and represented by IAM a number of years ago. And, historically the collective bargaining contracts between IAM and Eastern covering petitioners' bargaining craft, contain the usual unionshop provisions conditioning employment upon timely acquisition of union membership in IAM. Thus, any expansion of petitioners' bargaining craft and contract coverage, which could be achieved by IAM in bargaining with Eastern, would result in a corresponding increase in the union's dues paying membership among Eastern's employees, via the contract union shop provision.

During the years of IAM's representation of petitioners' bargaining craft, a growing number of Eastern's aforesaid cargo and baggage handlers and various other groups of Eastern's employees (having substantially lesser degrees of skill and training requirements for their jobs) have

been grouped together with petitioners' said bargaining craft by IAM into a single process of collective bargaining representation.

With the result, that petitioners' original certified bargaining craft has, become gradually absorbed into one big communalized and heterogeneous bargaining class of Eastern's employees; which is represented by IAM, in substance and manner, as one whole class or unit of employees for all purposes of collective bargaining; That has been placed by IAM under a single collective bargaining contract.

All employees in this said heterogeneous and communalized single bargaining class are permitted by IAM in an ongoing single collective bargaining process to vote on pertinent matters, affecting petitioners' employmental interests and careers, such as: collective bargaining contract ratification, the calling of strikes, the designation of bargaining negotiators to conduct bargaining negotiations, and the like.

IAM's said grouping of petitioners' original certified bargaining craft into this said heterogeneous bargaining class during recent years (without prior Board certification therefor), has resulted in petitioners' certified bargaining craft having only a numerically minority voice in all important employmental matters vitally affecting their employmental interests and careers.

As was noted by the lower district court in its Opinion (see Appendix A, Page 28), petitioners' earlier presentation to the NMB of their subject claim had resulted in the NMB's determination that it lacked jurisdiction to decide this controversy (Appendix C).

B *Proceedings Below*

The subject complaint was filed by petitioners in September of 1974. On October 23, 1974, IAM filed its motion to dismiss alleging as ground one therein that: ". . . the Court does not have jurisdiction over the subject matter of the complaint." On February 4, 1975, the lower district court issued his ruling sustaining IAM's said jurisdictional ground for dismissal (Appendix A). The lower court expressly based its ruling upon its legal conclusion that the Board had exclusive jurisdiction over petitioners' claim, under Section 2, Ninth, of the Act, 45 USC Section 152 (Ninth).

In due course, petitioners perfected their appeal from the lower court's judgment of dismissal to the Fifth Circuit; which rendered its per curiam judgment of "affirmed" on July 29, 1975 (Appendix B). It is from this judgment of affirmance by the Fifth Circuit that petitioners seek this court's issuance of a writ of certiorari.

JURISDICTION IN THE LOWER DISTRICT COURT was based upon the allegation in the complaint that the subject matter of the controversy arises under the Act, 45 US Code, Section 151 et seq.; along with the allegation that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs. Thus, original jurisdiction in the district court was based upon Section 1331 of Title 28 of the United States Code, as amended.

VI. REASONS WHY CERTIORARI SHOULD BE GRANTED

The Fifth Circuit has decided an important question of federal law in a way that would potentially and wrongfully deny tens of thousands of airline industry employees

access to the Federal Courts to correct violations of a lawful duty of fair representation owed them under the Federal Act by their respective collective bargaining representatives; and in a way which conflicts with an applicable analogous principle of law previously laid down by decisions of this court.

The lower court's ruling, that it lacked subject matter jurisdiction because petitioners' claim was found by the court to be within the exclusive jurisdiction of the Board under the Act, must be considered in the light of petitioners' basic claim set forth in their complaint, and stated below.

A. What Petitioners Seek Is Simply to Enjoy Right of Craft Organization and Craft Representation in Collective Bargaining as Sanctioned by the Act and the Board's Prior Certification

Petitioners claim that they, as well as the other employees in their Board certified bargaining craft are being denied by IAM their statutory rights that are conceptually stated in Section 2, Fourth, of the Act, 45 USC Section 152, Fourth, providing in pertinent parts as follows:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class. . . ."

This denial of petitioners' said statutory craft organizational and craft representational rights stems from IAM's manner and method of collectively representing petitioners' Board certified bargaining craft, as but a minority part

of an overall heterogeneous single bargaining class of sundry Eastern employees (WITHOUT PRIOR BOARD CERTIFICATION OF SUCH A SINGLE HETEROGENEOUS CLASS) (see the Summary of Facts in the Statement of the Case, supra).

IAM's complained of manner of representing petitioners' certified bargaining craft, in effect abrogates the statutory concept of CRAFT organization and CRAFT collective bargaining. It also emasculates the Board's prior certification of petitioners' homogeneous bargaining craft consisting primarily of highly skilled and highly craft motivated employees such as petitioners, who are lawfully licensed career airline mechanics.

The plight of petitioners' certified bargaining craft may be compared to that of a mighty ship that is desirous and capable of charting its own course to its own more distant port of call; but instead is commandeered into a single large convoy of other smaller vessels, which is sailing perhaps to another port.

Petitioners find frustrating and humiliating irony in the circumstance that their own collective bargaining representative, IAM, would deny them their craft aspirations and status; notwithstanding that petitioners' bargaining craft is sanctioned by the Act, as well as by the Board's prior certification. While at the same time, the craft aspirations and the craft organizational and bargaining rights, of the laborers, the ironworkers, the electricians, the plumbers, the heavy equipment operators, etc., who build and maintain the hangers and airports in which petitioners perform their very highly skilled tasks, are preserved intact.

Petitioners claim essentially that IAM's complained of manner and method of representing them in collective bargaining in the context presented constitutes a violation of IAM's lawful duty for fair representation owed to petitioners, as their statutory collective bargaining representative under the Act. *Steele vs. Louisville & Nashville R. Co.*, 323 U.S. 192, 15 LRRM 708; *Tunstall vs. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 15 LRRM 715; *Graham vs. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 25 LRRM 2033; *Brotherhood of Railroad Trainmen vs. Howard*, 343 U. S. 768, 30 LRRM 2258; *Vaca vs. Sipes*, 386 U.S. 171, 190-93, 64 LRRM 2369 (1967); *Thompson vs. Brotherhood of Sleeping Car Porters*, 316 F. 2d 191, 198-99, 52 LRRM 2880 (4th Cir. 1963); *Gainey vs. Brotherhood of Railway & Steamship Clerks*, 313 F 2d 318, 324, 52 LRRM 2196 (3d Cir. 1963); *Cunningham vs. Erle R.R. Co.*, 266 F. 2d 411, 415-16, 44 LRRM 2093 (2d Cir. 1959); *Simberlund vs. Long Island Rail Road Company*, 421 F. 2d, 1219, 73 LRRM 2451 (CA 2, 1970).

B. What Petitioners Do Not Seek is any Infringement of the Board's Jurisdictional Functions

In no way do petitioners seek to intrude into the exclusive jurisdictional domain of the Board to determine and certify bargaining crafts or classes along with the unions to represent them. For here the Board has already spoken by certifying petitioners' said bargaining craft, and IAM to represent petitioners' certified craft.

Neither do petitioners dispute the status of IAM as the certified statutory collective bargaining representative for petitioners' craft.

Neither do petitioners question the legality of IAM's

lawful right to separately represent any of Eastern's cargo and baggage handlers or other sundry groups of Eastern's employees; who were not included by the Board in its certification of petitioners' bargaining craft; but who have been grouped by IAM along with petitioners' certified craft into a single overall heterogeneous bargaining class for all purposes of collective bargaining representation, as complained of by petitioners.

Indeed, it is petitioners who seek to give vitality and meaning to the Board's certification; by requiring IAM to honor the Board's prior certification of petitioners' bargaining representation of petitioners' bargaining craft, by simply recognizing and conducting it's collective bargaining representation by petitioners' bargaining craft in a manner and method consistent with, and called for by, the Board's certification; At least, UNTIL SUCH TIME AS THE BOARD ITSELF MIGHT THROUGH LAWFUL PROCESSES DECIDE TO MODIFY ITS CERTIFICATION OF PETITIONERS' BARGAINING CRAFT.

For the courts to fail to adjudicate petitioners subject claim is to hold that the statutory collective bargaining representative—and not the Board, has power to determine which employees may appropriately be included in a statutory collective bargaining craft or class for purposes of collective bargaining representation. But, such a conclusion is in direct contradiction to the plain provisions of the Act that the Board—and not the union, is to determine and certify the bargaining craft or class, found in Section 2, Ninth, of the Act, 45 USC Section 152 (Ninth).,

In affirming without comment the lower district's court judgment and opinion, the Fifth Circuit presumeably acted on the same apparent basic misapprehension of the factual and legal issue presented in this case, as did the district

court. For, the district court in its opinion (see Appendix A, page 27), indicated that plaintiff's claim is based:

> ". . . Solely on the ground that the NMB has 'communalized' into one bargaining unit the employees who rightfully should be part of another bargaining unit. This is the principal legal question the court is called upon to decide, and, as noted above, it is precisely this question of 'who represents whom' which is vested in the unreviewable discretion of the National Mediation Board."

But, as is pointed out herein, and as petitioners sought to point out to the lower courts, petitioners' claim makes no attack upon any action by the Board. Rather, petitioners' claim attacks only the manner and method utilized by IAM in representing, or misrepresenting, petitioners' Board certified bargaining craft.

Petitioners' claim seeks to acknowledge, honor, and adhere to the Board's prior certification of their bargaining craft; whereas, IAM has, through its complained of manner and method of collective bargaining representation of petitioners' bargaining craft, disregarded and undermined the Board's prior certification of petitioners' craft, usurping unto itself the Board's statutory jurisdiction and discretion in determining which employees should be included in a bargaining craft. And, in so doing, IAM has at the same time denied petitioners their statutory right of craft organization and craft collective bargaining representation under the Act.

C. The Board Itself Has Expressly Denied Any Jurisdiction to Adjudicate Petitioners' Subject Claim (Appendix C)

The lower district court in its opinion quoted the following language from the determination by the Board that it (the Board) did not have jurisdiction over petitioners' subject claim:

> " 'In reviewing your application for the Board's services, it does not appear that there is an allegation of the existence of a representation dispute as described in Section 2, Ninth, of the Railway Labor Act. Additionally, there is no allegation that the certified representative and the carrier are at a bargaining impasse concerning the matters contained in your application, and thus an invocation for the Board's mediatory services is not appropriate.
>
> " 'The National Mediation Board does not have jurisdiction to determine the manner in which a carrier and a union, certified for one or more crafts or classes, bargain, and thus the questions which you raise are not properly resolved by the National Mediation Board, but may be more effectively resolved by direct conferences between the affected parties.
>
> " 'Since there is no jurisdictional basis for the processing of your application in its present context, that is, failure to allege and demonstrate the existence of a representation dispute, the application is dismissed.' " (See District Court's opinion, Appendix A, Page 28).

The Board, unlike the lower district court and the Fifth Circuit, recognized and acknowledged its own inadequacy as a forum to adjudicate petitioners' basic claim of unfair

representation by IAM. To illustrate, let it be postulated that the Board had concluded that it did have jurisdiction of this claim (as held by the lower courts); and further, that it did agree with petitioners' basic complaint that IAM has unfairly represented petitioners; and further that IAM shall likely continue its said unfair representation of petitioners' certified bargaining craft. WHAT COULD THE BOARD DO ABOUT IT? FIRST of all, we know of no method by which the Board could award any compensatory or other damages for IAM's past unfair representation. SECOND, neither could the Board enjoin IAM from continuing such unfair representation of petitioners. AND THIRD, all the Board could do pursuant to its exclusive statutory jurisdiction, is to determine that petitioners' bargaining craft is appropriate and then certify petitioners' bargaining craft along with IAM as its statutory collective bargaining representative; But this would amount to only a redundant echo of what the Board has already done.

On the other hand, what would be the case if the lower court had asserted jurisdiction to adjudicate petitioners' said claim of unfair representation by IAM. FIRST, the court would not be called upon to determine either the appropriateness of petitioners' bargaining craft as an appropriate unit, or IAM's status as the craft representative, since the Board has already done this. SECOND, if the court determined that petitioners' claim was meritorious, then the court could award appropriate damages to cover any of petitioners' properly proven losses. AND THIRD, the court could insure that IAM would desist from its subject course of unfair representation of petitioners' bargaining craft, through exercise of the court's injunctive powers. Each of these said possible remedies by the court would have the effect of upholding and requiring adherence

to—and not departure from, what the Board had previously provided through its said certification of petitioners' bargaining craft and IAM as its representative.

D. Court Jurisdiction of Petitioners' Claim is Strongly Suggested By Prior Decisions of this Court Holding, that the Exclusive Jurisdiction of the Railroad Adjustment Board under the Act, did not Bar Court Jurisdiction to Decide Unfair Representation Cases Against Unions and Employers Jointly

The lower courts' denial of jurisdiction, to adjudicate petitioners' claim of unfair representation by IAM, runs counter to the analogous rationale of the Supreme Court announced in the following cases: *Conley vs. Gibson*, 355 U.S. 41, 44, LRRM 2089 (1957); *Glover vs. St. Louis-San Francisco Railway Company*, 393 U.S. 323, 70 LRRM 2097 (1969); *Czosek vs. O'Mara*, 397 U. S. 25, 73 LRRM 2481 (1970).

In the *Conley* case, supra, this court reversed the lower court's conclusion that exclusive jurisdiction lay in the Adjustment Board under Section 3 First (i) of the Railway Labor Act, 45 USC Section 153, First (i). The complaint there, as here, charged that the defendant statutory collective bargaining representative had unfairly represented plaintiffs. In this regard the court stated:

> "We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that Section 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved the interpretation and application of the collective bargaining agreement. But Section 3 First (i) by its own terms

> applies only to 'disputes between an employee or group of employees and a carrier or carriers.' This case involves no dispute between an employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination. . . . ."

Moreover, notwithstanding the general rule that the Act places exclusive jurisdiction in the Railroad Adjustment Board, under Section 3 First (i) of the Act, to interpret the terms of a collective bargaining agreement; and notwithstanding that this Said Section 3 First (i) of the Act by its terms applies to ". . . disputes between an employee or group of employees and a carrier or carriers. . .."; nevertheless, employees may also JOIN THE CARRIER in a suit involving the terms of a collective bargaining contract, brought against their statutory collective bargaining representative for breach of its duty of fair representation. See the *Glover* case, supra, wherein the court said:

> ". . . In the present case . . . the plaintiffs sought relief not only against their union but also against the railroad, . . . it might at one time have been thought that the jurisdiction of the Railroad Adjustment Board remains exclusive in a fair representation case, to the extent that relief is sought against the railroad for alleged discriminatory performance of an agreement validly entered into and lawful in its terms. (See, e.g. *Hayes vs. Union Pacific Railroad Company*, 184

> F 2d 337, 26 LRRM 2566 (CA 9, 1950), cert. denied, 340 U.S. 492, 27 LRRM 2456 (1951). This view however, was squarely rejected in the *Conley* case, where we said 'for the reasons set forth in the text, we believe (*Hayes*, supra) was decided incorrectly.' 355 U.S., at 44, N.4. . . . . Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the 'dispute' is one between some employees on the one hand and the union and management together on the other, not one 'between an employee or a group of employees and a carrier or carriers.' FINALLY, THE RAILROAD ADJUSTMENT BOARD HAS NO POWER TO ORDER THE KIND OF RELIEF NECESSARY EVEN WITH RESPECT TO THE RAILROAD ALONE, IN ORDER TO END ENTIRELY ABUSES OF THE SORT ALLEGED HERE (emphasis added). The Federal Courts may therefore properly exercise jurisdiction over both the union and the railroad. (Citations omitted)."

In *Czosek*, this court said in an unfair representation case that:

> ". . . surely it is beyond cavil that a suit against the union for breach of its duty for fair representation is not within the jurisdiction of the National Railroad Adjustment Board nor subject to the ordinary rule that administrative remedy should be exhausted before resort to the courts. (Citations omitted). The claim against the union defendants for the breach of their duty of fair representation is a discreet claim quite apart

> from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board."

This court's rejection of the exclusive jurisdictional argument advanced in the *Czosek*, *Glover*, and *Conley* cases, is analogous and applicable to the lower court's dismissal in this case based upon their conclusion that exclusive jurisdiction over petitioners' subject unfair representation claim against IAM was within the exclusive jurisdiction of the National Mediation Board.

VII. CONCLUSION

On the basis of the arguments advanced herein, and the authorities cited in support thereof, petitioners, respectfully submit that the petition for writ of certiorari should be granted. Upon issuance of the writ, the decision of the Fifth Circuit Court of Appeals should be reversed and remanded with instructions to reverse the lower district court's dismissal of petitioners' complaint, and to send the proceeding back to the lower district court for further proceedings.

TOM CARTER,
Counsel for Petitioners
1726 Fulton National Bank Building
Atlanta, Georgia 30303
(404) 688-7026

CERTIFICATE

I, TOM CARTER, Counsel for Petitioners in this Court, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the following persons:

Mr. J. R. Goldthwaite, Jr.
Adair, Goldthwaite, Stanford & Daniel
600 Rhodes Haverty Building
Atlanta, Georgia 30303
Attorney of record for Respondent in this Court, who was the Appellee in the Fifth Circuit Court of Appeals, and defendant in the Lower District Court.

This ..... day of October, 1975.

.....

TOM CARTER,
Counsel for Petitioners

APPENDIX "A"

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF GEORGIA

Civil Action File No. C74-1780A

MATHEW S. JASINSKI, EDWARD BOROWIK, MAX R. SHELTON, JOHN R. THOMAS, GEORGE WIMBERLY, JOHN GOODLEFSKY, STEPHEN J. KRATZ, PHILLIP BEAULIEU, M. E. URRA, J. STEWART HARRISON, JOHN W. ROACH, JR. and CHARLES K. JOHNSON

VS

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

JUDGMENT

This action came on for consideration before the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, GRANTING deft's Motion to Dismiss for lack of subject matter jurisdiction.

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed, and that the defendant, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS recover of the plaintiffs, MATHEW S. JASINSKI, EDWARD BOROWIK, MAX R. SHELTON, JOHN R. THOMAS, GEORGE WIMBERLY, JOHN GOODLEFSKY, STEPHEN J. KRATZ, PHILLIP BEAULIEU, M. E. URRA, J. STEWART HARRISON, JOHN W. ROACH, JR. and CHARLES K. JOHNSON, their costs of action.

• • •

Dated at Atlanta, Georgia, this 4th day of February, 1975.

BEN H. CARTER
Clerk of Court
By: Mary E. Hall

Filed and entered in Clerk's Office February 4th, 1975
BEN H. CARTER, Clerk
By: Mary E. Hall
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in clerk's office Feb. 4, 1975.
BEN H. CARTER, Clerk
By: Hary E. Hall, Deputy Clerk

C74-1780A

MATHEW S. JASINSKI, EDWARD BOROWIK, MAX R. SHELTON, JOHN R. THOMAS, GEORGE WIMBERLY, JOHN GOODLEFSKY, STEPHEN J. KRATZ, PHILLIP BEAULIEU, M. E. URRA, J. STEWARD HARRISON, JOHN W. ROACH, JR., and CHARLES K. JONHSON

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

ORDER

Plaintiff airline mechanics bring this action against the defendant labor union under 28 U.S.C. § 1331 for violations of the Federal Railway Labor Act, 45 U.S.C. § 151, *et seq.* The plaintiffs allege that defendant International Association of Machinists and Aerospace Workers [IAM], in conjunction with plaintiffs' employer, Eastern Airlines, Inc. [Eastern], has wrongfully ignored plaintiffs' craft and unit status as a separate bargaining unit, consisting of only airline mechanics and specialists

and their helpers and apprentices, to the plaintiffs' detriment. The plaintiffs alleged damages of $15,000 to each plaintiff and ask for injunctive relief, attorneys' fees of $25,000 and exemplary damages of $1 million. The case is presently before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

Specifically, the planitiffs allege injury by the defendant's actions in

> ". . . unilaterally unlawfully absorbing for all collective bargaining purposes plaintiffs' said certified craft and unit into one big communalized and heterogeneous class and uncertified bargaining unit of employees; including not only plaintiffs' said unit, but the separate bargaining unit of Eastern's stock (store) clerks, and the separate bargaining unit of Eastern's print shop employees, and the separate bargaining unit of Eastern's employees performing mostly cargo and baggage handling work and other various and sundry employees."

The plaintiffs show that the National Mediation Board [NMB] is the administrative agency empowered by statute to certify a craft or class of employees as an appropriate collective bargaining unit and to certify a duly selected labor organization as the exclusive collective bargaining representative of that craft. Plaintiffs' claim that their bargaining unit was determined and certfied by the NMB in a Board proceeding styled Case No. R-3639 to include the following: (1) airline mechanics, specialists, their helpers and apprentices previously certified by the Board in Case Nos. R-407 and R-576; (2) a "fringe group" of Eastern's employees who performed ground service and cleaning functions a preponderance of their

time; and (3) a "fringe group" of shop laborers and janitors added by the Board in Case No. R-1976.

Plaintiffs' claim the Board in Case No. 3639 expressly excluded from plaintiffs' bargaining unit the following groups of Eastern's employees: (1) cargo and baggage handlers, (2) stock (store) personnel, and (3) print shop employees.

It is the inclusion without Board certification of these latter three groups which plaintiffs allege put them in a minority position in their "own" union, and deprives them of a meaningful and effective voice and the right to organize and bargain collectively in their union and has caused them monetary damages and economic losses because they have lost the majority and lack a fair voice in bargaining with Eastern about wages, hours, terms and conditions of employment.

The defendant's first ground for dismissal in its motion is that this Court lacks subject matter jurisdiction to hear a dispute concerning representation of employee bargaining units subject to the Railway Labor Act—a matter vested in the exclusive jurisdiction of the National Mediation Board. *Switchmen's Union v. N.M.B.*, 320 U. S. 297 (1943); *Brotherhood of Railway and Steamship Clerks, etc. v. United Transportation Service, etc.*, 320 U.S. 715 (1943); *General Committee of Adjustment, etc. v. Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323 (1943); *Rose, et al. v. Brotherhood of Railway and Steamship Clerks, etc.*, 181 F.2d 944 (4th Cir. 1950), *cert. den.*, 340 U.S. 851 (1950); *UNA Chapter, Flight Engineers' Int. Assoc. v. N.M.B.*, 294 F.2d 905 (D.C. Cir. 1961); *Brotherhood of Railway and Steamship Clerks, etc. v. N.M.B.*, 374 F.2d 269 (D.C. Cir. 1966); *Aeronautical Radio, Inc. v. N.M.B.*,

380 F.2d 624 (D.C. Cir. 1967), *cert. den.*, 289 U.S. 912 (1967); *Reynolds, et al. v. Int. Assoc. of Machinists*, etc., ... F. Supp. ....., 87 LRRM 2133 (MD N.C. 1973), *aff'd.*, 498 F.2d 1397 (4th Cir. 1974).

Section 2, Ninth of the Railway Labor Act. 45 U.S.C., §151-163, 181-188, provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days . . . the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of the Act. . . ."

It is clear from the case law that disputes concerning the representation of employees in bargaining units are exclusively within the jurisdiction of the National Mediation Board and therefore not reviewable by the courts. *Switchmen's Union v. N.M.B., supra*, and other cases cited above.

As the Court of Appeals stated in the *Rose* case, *supra*:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute was to vest in the Mediation Board exclusive jurisdiction over the certification of bargaining. And it is equally clear that the exercise of discretion by the board with respect to such matters is not subject to review by the

courts. Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61; General Committee, etc. v. M-K-T R. Co., 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76; Brotherhood of Railway Clerks etc. v. United Transport Service Employees, 320 U.S. 715, 64 S.Ct. 260, 88 L.Ed. 420; Order of Railway Conductors of America, etc. v. Penn. R. Co., 323 U.S. 166, 65 S.Ct. 222, 89 L.Ed. 154; Steele v. L. & N. R. Co., 323 U.S. 192, 205 65 S.Ct. 226, 89 L.Ed. 173. And see Slocum v. D. L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577." 181 F.2d at 946.

The legislative history of Section 2, Ninth, of the Railway Labor Act bears out this construction of the Act, as the Court in *General Committee, etc. v. Missouri-Kansas-Texas R.R. Co., supra*, noted:

> "It is clear from the legislative history of §2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees . . . *However wide may be the range of jurisdictional disputes embraced within §2, Ninth, Congress did not select the courts to resolve them.* To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within §2, Ninth, the administrative remedy is exclusive." 14 LRRM at 632, 633 (footnotes omitted).

The gravamen of plaintiffs' claim is that they are being unfairly represented by the IAM because other crafts and classes of employees have been wrongfully included with them in a single bargaining unit. For this lack of fair representation, they seek monetary and exemplary dam-

ages. Plaintiffs allege that a federal question is presented by their claim of unfair representation under the Railway Labor Act, 45 U.S.C. § 151, *et seq. Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944); *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 323 (1969); *Thompson v. Sleeping Car Porters*, 316 F.2d 191 (4 Cir. 1963), and that the courts federal question jurisdiction is properly invoked under 28 U.S.C. § 1331.

This Court disagrees. Plaintiffs' claim of unfair representation is based *solely* on the ground that the NMB has "communalized" into one bargaining unit employees who rightfully should be part of another bargaining unit. This is the principal legal question the Court is called upon to decide, and, as noted above, it is precisely this question of "who represents whom" which is vested in the unreviewable discretion of the National Mediation Board.

The cases cited by plaintiffs where the Court assumed jurisdiction are inapposite to the instant case because they are distinguishable on their facts. The *Steele* case, *supra*, did not invoke the question of which crafts or classes should be included in a single bargaining unit. *Steele* concerned blatant racial discrimination by white firemen in the Brotherhood of Locomotive Firemen and Enginemen against negro firemen—members of the same "craft." The Court in the *Czosek* case, *supra*, allowed a suit by plaintiffs against their union for the union's "arbitary and capricious" refusal to process the claims of the plaintiffs who had been discharged after the merger of the Erie and Delaware, Lackawanna & Western Railroads. *Czosek* involved no claim of an improper grouping of employees by the NMB into a single bargaining unit. The *Clover v. St.*

Louis-San Francisco Railway case, *supra*, involved a claim by 13 employees, eight black and five white, against their railroad and union, for failure to promote them to the position of carmen allegedly in order to keep blacks out of that position. As in *Steele*, the cause of action concerned racial discrimination, not the misgrouping of distinct crafts into a single bargaining unit. The *Thompson* case, *supra*, allowed a claim of unfair representation against the union. But *Thompson* was grounded on alleged ingidious nonracial discrimination against the plaintiff and did not concern misgrouping of employees by the NMB, as in the instant case.

The plaintiffs argue that this controversy lies wholly outside the jurisdiction of the National Mediation Board and the NMB has already expressly held so regarding this specific case. The plaintiffs applied to the NMB on February 28, 1974, to have this controversy decide by the Board. The defendant union and Eastern Airlines submitted their response. On July 15, 1974, the National Mediation Board rendered its decision in the proceeding designated "File C-4294." The Board denied that it had jurisdiction to adjudicate the controversy. The Board stated the following:

> "In reviewing your application for the Board's services, it does not appear that there is an allegation of the existence of a representation dispute as described in Section 2, Ninth of the Railway Labor Act. Additionally, there is no allegation that the certified representative and the Carrier are at a bargaining impasse concerning the matters contained in your application, and thus an invocation for the Board's mediatory services is not appropriate.
>
> "The National Mediation Board does not have

> jurisdiction to determine the manner in which a carrier and a union, certified for one or more crafts or classes, bargain, and thus the questions which you raise are not properly resolved by the National Mediation Board, but may be more effectively resolved by direct conferences between the affected parties.
>
> Since there is no jurisdictional basis for the processing of your application in its present context, that is, failure to allege and demonstrate the existence of a representation dispute, the application is dismissed."

The Board characterized this dispute as one concerning "the manner in which a carrier and a union, certified for one or more crafts or classes, bargin . . ." This Court does not characterize this case as involving a dispute between the union and carrier. This is a dispute between the union and its employees over the propriety of including various crafts and classes of employees in one bargaining unit. Such a determination lies within the exclusive jurisdiction of the National Mediation Board, as the Court has noted above. The failure of the National Mediation Board to characterize this case as the plaintiff urges, and as this Court holds, is a matter to be pressed upon the Board by the plaintiffs in subsequent proceedings. In any event, this Court is barried by statute and case law from determining who should be included in plaintiffs' bargaining unit. Therefore the Court lacks the jurisdiction to award a monetary judgment to plaintiffs on the basis of a proven wrongful grouping of employees, since such an award would have to be bottomed on a resolution of the underlying legal question which the Court lacks the subject matter jurisdiction to resolve.

Inasmuch as this issue is dispositive of the entire case

the Court declines to address itself to defendant's other ground for dismissal.

Accordingly, the Court ORDERS the defendant's motion to dismiss GRANTED for lack of subject matter jurisdiction.

SO ORDERED, this 4 day of February, 1975.

RICHARD C. FREEMAN
UNITED STATES
DISTRICT JUDGE

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1978
Summary Calendar*

MATHEW S. JASINSKI, ET AL.,
Plaintiffs-Appellants,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(July 29, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

---

* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

APPENDIX "C"

NATIONAL MEDIATION BOARD

Washington, D.C. 20572

July 15, 1974

File No. C-4294

Mr. Thomas Linton Carter, Jr.
Suite 1726
Fulton National Bank Building
55 Marietta Street, N. W.
Atlanta, GA 30303

Dear Mr. Carter:

This has reference to the exchange of correspondence generated by your letter of February 28, 1974, attaching an application to invoke the services of the National Mediation Board which you captioned as involving "Dispute-Violation of Eastern and IAM of the collective bargaining craft and unit of Eastern's airline mechanics and related employees; and deprivation of the statutory organizational and craft rights of Applicants and their fellow employees under the Railway Labor Act, as amended. The National Mediation Board has circulated your application to the Union and Carrier involved soliciting their comments.

Comments of the Carrier were received on March 18, 1974, and transmitted to you on April 5, 1974. The IAM, on April 12, 1974, indicated that it agreed with the Carrier's position in this matter and that the application should be dismissed for the same reasons expressed by the Carrier. Unfortunately, the letter of the IAM dated April 12, 1974, was not sent to you before this date (copy now enclosed).

In revewing your application for the Board's services,

it does not appear that there is an allegation of the existence of a representation dispute as described in Section 2, Ninth of the Railway Labor Act. Additionally, there is no allegation that the certified representative and the Carrier are at a bargaining impasse concerning the matters contained in your application, and thus an invocation for the Board's mediatory services is not appropriate.

The National Mediation Board does not have jurisdiction to determine the manner in which a carrier and a union, certified for one or more crafts or classes, bargain, and thus the questions which you raise are not properly resolved by the National Mediation Board, but may be more effectively resolved by direct conferences between the affected parties.

Since there is no jurisdictional basis for the processing of your application in its present context, that is, failure to allege and demonstrate the existence of a representation dispute, the application is dismissed.

Very truly yours,
Rowland K. Quinn, Jr.
Executive Secretary

cc-to: Mr. John P. Mead
Staff Vice President-Industrial Relations
Eastern Airlines, Inc.
Miami International Airport
Miami, FL 333148
Mr. Floyd E. Smith, Int'l President
International Association of Machinists
& Aerospace Workers, AFL-CIO
1300 Connecticut Avenue, N.W.
Washington, DC 20036